

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES H. CALLOWAY,

Defendant-Appellant.

UNPUBLISHED

March 20, 2003

No. 230582

Wayne Circuit Court

LC No. 00-000760

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment without parole for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

We first consider defendant's contention that insufficient evidence of premeditation and deliberation existed to support his conviction of first-degree premeditated murder. In reviewing a challenge to the sufficiency of the evidence, this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational juror could have found that the elements of the crime charged were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

To convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim, and that the act of killing was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002). Premeditation and deliberation require sufficient time to permit the defendant to take a second look. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation may be established by evidence of (1) the prior relationship between the defendant and the victim, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, including the type of weapon used and the location of the wounds inflicted, and (4) the defendant's conduct after the killing. *Abraham, supra* at 656; *People v Thomas Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993). Circumstantial evidence and the reasonable inferences arising therefrom may

suffice to prove the elements of a crime, and minimal circumstantial evidence is sufficient to prove a defendant's state of mind. *Ortiz, supra* at 301; *Abraham, supra* at 656. "Proof of motive is not essential." *Abraham, supra* at 657.

Although the primary issue at trial was the identity of the person who shot the victim as he sat inside his pickup truck, on appeal defendant does not specifically contest his identity as the shooter. Nonetheless, we note that ample evidence established defendant's identification as the shooter. The preliminary examination testimony of deceased witness Sharon Nicholson reflected her certainty that between 3:00 a.m. and 4:00 a.m. on the morning of September 25, 1999, she heard four or five gunshots, and she then looked outside across a nearby intersection and saw defendant, whom she had known for many years because he grew up with her children, turning and running away from the victim's truck. The preliminary examination testimony of Charles Hill, who lived with Nicholson and failed to timely appear for his testimony at trial, similarly indicated that, between 3:00 a.m. and 4:00 a.m. on the morning of September 25, 1999, Hill heard four or five gunshots, and he then looked across the intersection shortly thereafter to see defendant, whom Hill had known for fifteen years, running away from the driver's side of the victim's truck and carrying a rifle. Although Hill later appeared at trial and expressed his inability to identify defendant, another witness testified that, on the morning of the shooting, Hill had apprised him of the shooting and described seeing defendant with a gun near the driver's side of the victim's truck. MRE 801(d)(1)(C). The jury apparently found Nicholson's and Hill's statements of identification to be credible, and this evidence constituted sufficient evidence of defendant's identification. *Nowack, supra* at 399-400.

With respect to premeditation and deliberation, the police survey of the murder scene, which included the victim's truck and the truck's skid marks, glass fragments, and bullet casings located on the street in front of defendant's house, reflected that a powerful, rapid-fire, semi-automatic rifle was used to fire several shots at the victim's truck, including the driver's side windshield and front grill, as it backed away from the curb in front of defendant's house. The locations of the bullet casings indicated that several shots were fired at the victim's truck while the shooter moved into the street in pursuit of the fleeing vehicle, which came to rest against the curb on the opposite side of the street from defendant's house. From the point where the victim's truck began speeding away, the shooter crossed a distance of approximately thirty yards to arrive where the victim sat in his truck, stunned from the bullet and glass fragments that had injured the left side of his body, according to the medical examiner's testimony. On arriving next to the driver's side of the truck, the shooter placed the barrel of the rifle against the back of the victim's skull and administered the fatal gunshot wound, then left the scene. The evidence of this repeated firing of a large caliber semi-automatic weapon at the victim, infliction of multiple gunshot wounds including the fatal bullet wound to the back of the victim's head, and flight from the scene of the shooting raised a reasonable inference that the shooter, defendant, premeditated and deliberated the victim's murder. *Anderson, supra* at 537-538; *Berry, supra* at 128. Furthermore, the time frame during which defendant crossed the thirty-yard distance to the resting place of the victim's vehicle before inflicting the fatal shot afforded ample opportunity to reconsider his inclination to murder the victim. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993); *People v Gonzalez*, 178 Mich App 526, 531; 444 NW2d 228 (1989). Accordingly, the evidence supported a rational jury's determination beyond a reasonable doubt that defendant premeditated and deliberated the victim's murder.

II

Defendant also argues that the prosecutor improperly introduced, without notice, evidence that he dealt drugs from the house outside which the victim was shot. Because defendant did not object to the prosecutor's elicitation of this evidence at trial, we review defendant's unpreserved suggestion of prosecutorial misconduct only to determine whether a plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Evidence of a defendant's uncharged criminal acts may be admissible pursuant to MRE 404(b) when the prosecutor offers the evidence for the noncharacter purpose of showing the close relationship of the other acts to the crime charged; or, in other words, "[e]vidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964).

The prosecutor theorizes that the evidence of defendant's drug dealing was admissible in this case because the drug dealing constituted an incidental crime that "presented the entire picture of the murder" and "helped make sense of the murder and the defendant's possible motive." The record reflects that, apart from the drug-related testimony challenged by defendant, the only evidence concerning drugs otherwise introduced at trial included the following facts: (1) the police discovered a crack pipe in the cab of the truck next to the victim; (2) the victim's autopsy revealed cocaine in his system; and (3) the police recovered from defendant's residence a crack pipe and a small, unspecified quantity of suspected marijuana. No evidence tended to establish that the victim routinely or ever purchased drugs from defendant before the shooting, and no testimony suggested any disagreement between defendant and the victim, who were friends. While the victim must have ingested cocaine at some point in time before his death to permit its detection in his body, the record contains no evidence of the victim's whereabouts between his presence at his parents' house in Sterling Heights at some unspecified time on the evening of September 24, 1999, and his arrival at defendant's residence early on September 25, 1999. Although the police found a crack pipe inside the victim's truck and inside defendant's residence, they discovered no crack cocaine on defendant's person or near his residence. Without some further connection suggesting that the victim arrived at defendant's residence for the purpose of purchasing drugs from defendant, we find speculative the notion that defendant and the victim participated in a drug transaction immediately before the shooting, which led to the victim's murder.

The minimal evidence supporting the prosecutor's theory of a drug deal gone awry appears to have been the motivation for her introduction of the evidence that defendant dealt drugs from his house. However, the testimony regarding defendant's general drug dealing did not constitute evidence so "connected with the crime of which defendant [wa]s accused that proof of one incidentally involves the other or explains the circumstances of the crime." *Sholl*, *supra* at 742. The challenged testimony concerning defendant's *general* drug dealing activities

did not tend to strengthen the notion that *the victim* purchased drugs from defendant immediately before his murder.¹ Although we find the evidence of defendant's general drug dealing inadmissible in this case under MRE 404(b), the issue concededly presents a close question. Because we find no suggestion in the record or any assertion by defendant that the prosecutor introduced the evidence in bad faith, we conclude that no prosecutorial misconduct occurred. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

Even assuming the admission of the testimony concerning defendant's drug dealing constituted plain error, the admission of the evidence did not affect defendant's substantial rights. *Carines*, *supra* at 763-764. In light of the pattern of physical evidence found by the police at the murder scene, the identifications of defendant as the individual with a rifle immediately following the shooting by Hill and Nicholson, who had known defendant for many years, and the testimony of the police and medical examiner that tended to establish defendant's premeditation and deliberation of the victim's murder, we cannot conclude that the admission of the drug dealing evidence affected the outcome of defendant's trial, or resulted in the conviction of an actually innocent defendant.^{2,3} *Schutte*, *supra* at 720.

¹ Accordingly, *Sholl*, *supra*, is distinguishable from the instant case. *Sholl* involved evidence that the defendant charged with criminal sexual conduct "had used marijuana on the evening when he and the complainant had sexual relations." *Id.* at 740. The incidental drug use in *Sholl* related to the specific crime charged, *id.* at 741-742, while in this case the general evidence of defendant's drug dealing, which did not identify the victim as a customer of defendant, did not establish that immediately before the shooting the victim purchased drugs from defendant.

² Similarly, the prosecutor's failure to give notice of his intent to introduce the drug dealing evidence as required by MRE 404(b)(2) did not qualify as plain error that affected defendant's substantial rights. *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001). Although notice to defendant would have provided him the opportunity to challenge the admission of the evidence before trial, *id.* at 454, in light of the properly admitted evidence supporting defendant's convictions, the introduction of the drug dealing evidence did not affect the outcome of defendant's trial. To the extent that the prosecutor argues that MRE 404(b) does not apply to "res gestae" evidence, the prosecutor ignores that according to MRE 101, the rules of evidence govern the admissibility of evidence in all Michigan court proceedings, and the evidence of defendant's uncharged drug dealing plainly constituted other acts evidence that falls within the scope of MRE 404(b). Furthermore, the prosecutor cites no controlling authority for the proposition that the Michigan Rules of Evidence do not govern the admissibility of "res gestae" evidence of other acts. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

³ We decline to address defendant's insinuation that the prosecutor engaged in misconduct by improperly introducing evidence that defendant threatened to kill a witness, because defendant does not properly argue the merits of this allegation of error. *Ewing v Detroit*, 252 Mich App 149, 169; 651 NW2d 780 (2002); *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). No evidence whatsoever indicated that defendant threatened anyone. Hill's testimony, both at the preliminary examination and at trial, averred that defendant's brother threatened to kill him if he testified at defendant's preliminary examination, but Hill and another witness expressly testified at trial that, contrary to defendant's argument on appeal, defendant never threatened them.

III

Defendant further avers that the prosecutor improperly read into the record at trial Hill's preliminary examination testimony, without having undertaken the due diligence in locating a missing witness that MRE 804(a)(5) requires. According to defendant, the prosecutor's reading of Hill's prior testimony at trial, before Hill himself appeared to testify, permitted her to introduce as damaging substantive evidence Hill's prior identification of defendant, of which Hill otherwise expressed uncertainty at trial. We decline to consider defendant's challenge to the prosecutor's showing of due diligence in securing Hill's presence at trial. Defendant waived this issue, thus extinguishing any error, when his counsel affirmatively expressed satisfaction with the court's characterization of Hill as unavailable and to the reading of his preliminary examination testimony into the record. *People v Carter*, 462 Mich 206, 208-209, 214-216, 219-220; 612 NW2d 144 (2000).

In a related claim, defendant alleges that his counsel was ineffective when she failed to challenge the introduction of Hill's preliminary examination testimony. We find, however, that, irrespective of whether the trial court properly admitted Hill's prior testimony pursuant to MRE 804, Hill's prior testimony concerning his identification of defendant was admissible under MRE 801(d), which provides, in relevant part:

A statement is not hearsay if—

(1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, . . . or (C) one of identification of a person made after perceiving the person[.]

Hill was subject to defense counsel's extensive cross-examination at trial concerning the degree of his certainty of defendant's identity as the shooter. Even had Hill first testified at trial denying his ability to positively identify the person with the rifle as defendant, as defendant urges should have occurred, the prosecutor still could have introduced as substantive evidence Hill's prior inconsistent testimony that positively identified defendant as the person with the rifle.⁴ *People v Chavies*, 234 Mich App 274, 281-282; 593 NW2d 655 (1999).

⁴ The only inconsistency between Hill's preliminary examination and trial testimony involved the degree of certainty of his identification of defendant as the person with the rifle. Contrary to defendant's assertion on appeal, Hill's preliminary examination testimony did not mention defendant's drug dealing. With respect to defendant's allegation regarding the hearsay nature of the prior testimony concerning threats by defendant's brother, which testimony Hill reiterated at trial, the statements did not constitute hearsay because the prosecutor did not offer them for their truth. MRE 801(c). The statements regarding defendant's brother's threats tended to explain Hill's initial reluctance to testify at defendant's preliminary examination and the change at trial in the certainty of Hill's identification of defendant, and to rebut Hill's explanation that his identification of defendant at trial differed from his previous identification of defendant because the prior identification had resulted from police coercion.

Because defense counsel had no basis for objecting to the admission of Hill's prior testimony regarding his identification of defendant, counsel was not ineffective in this regard. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, defendant has not demonstrated any prejudice arising from the reading of his preliminary examination testimony into the record because, other than the inconsistency between Hill's degree of certainty of his identification of defendant as the person with the rifle, the preliminary examination testimony echoed his testimony at trial. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

IV

Defendant additionally contends that the trial court improperly admitted hearsay testimony by the victim's sister that she heard the victim mention the name Red. We review the trial court's admission of evidence for a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

We hold that the trial court properly admitted the victim's sister's testimony that she heard the victim mention the name Red because the testimony did not constitute hearsay, which is defined, in relevant part, as an oral assertion "other than one made by the declarant while testifying at the trial . . . , offered in evidence to prove the truth of the matter asserted." MRE 801(a) and (c). The mere fact that the victim made out of court references to the name Red does not constitute an assertion concerning the truth of any particular fact. *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). The victim's sister did not testify that the victim had identified Red as defendant, which would have constituted an out of court statement offered for its truth. The sister instead testified to her own recognition of defendant as Red on the basis of a prior encounter with him. Even assuming some error in the sister's testimony concerning the victim's mention of Red, the error would qualify as harmless in light of its nonincriminating nature and several other witnesses' properly admitted testimony identifying defendant as Red. *People v Smith*, 456 Mich 543, 554-555; 581 NW2d 654 (1998).

V

Lastly, we address defendant's additional allegations that trial counsel was ineffective. Defendant filed a motion for a new trial in which he argued that counsel was ineffective in various respects. Accordingly, defendant established a record below regarding most of his challenges to the adequacy of counsel's representation. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To the extent that defendant now raises additional examples of alleged ineffective assistance for the first time on appeal, this Court's review of these allegations is limited to mistakes apparent on the existing record. *Id.*

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312; *Rodgers, supra* at 714. The

defendant must overcome the strong presumptions that counsel rendered effective assistance and that counsel's actions represented sound trial strategy. *Rodgers, supra* at 714-715.

A

Defendant first contends that counsel was ineffective in excluding from evidence testimony by the police laboratory chemist that he detected gunpowder residue in samples from two individuals the police found with defendant inside his residence at approximately 9:00 a.m. or 9:30 a.m. on the morning the victim was killed. Although a strong presumption exists that defense counsel's decisions regarding what evidence to present at trial reflect sound trial strategy, we can conceive of no reasonable trial strategy furthered by the exclusion of this evidence. The evidence raised an inference that the other individuals found inside defendant's residence might have had some involvement in the victim's killing.

However, even assuming that defense counsel provided objectively unreasonable assistance in requesting the suppression of the other individuals' gunshot residue test results, we find after reviewing the entire record that no reasonable probability existed that, but for counsel's error, the result of the proceedings would have been different, and that defendant's trial was not fundamentally unfair or unreliable. *Rodgers, supra* at 714. Nicholson testified with certainty that she saw defendant, whom she had known for many years, alone and running away from the victim's truck. While Hill observed another individual in the area of the passenger side of the victim's truck after the shooting, Hill's preliminary examination testimony unqualifiedly identified defendant, whom Hill also had known since his childhood, as the person Hill saw with a rifle running away from the driver's side of the victim's truck. Even though Hill's trial testimony equivocated regarding his ability to identify the person with the rifle as defendant, Hill never affirmatively suggested that someone else other than defendant had the rifle. Accordingly, irrespective of whether someone other than defendant might have fired or handled a weapon within several hours of the victim's killing,⁵ the *only* evidence at trial identifying the person running from the driver's side of the victim's truck with a rifle pointed to defendant, no one else.

The jury had to determine the credibility of Hall and Nicholson and the third witness who testified concerning Hill's identification of defendant after the shooting, and we find that evidence of the presence of gunshot residue on other individuals would not reasonably have altered the jury's determination. Accordingly, we conclude that the exclusion of the evidence of the presence of gunshot residue on the other individuals did not deprive defendant of a substantial defense. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

B

Defendant next argues that counsel should have objected to opinion testimony by a police evidence technician and the assistant medical examiner, which opinions exceeded the scope of the witnesses' expertise.

⁵ The chemist testified that a person might carry gunshot residue anywhere on his person if he stood within a foot or two of another person who fired a weapon, and that a person could get gunshot residue on his hands by handling a weapon that someone else had fired.

According to defendant, counsel should have objected to the evidence technician's "speculat[ion] that the shooter stepped onto the street and fired shots at the deceased as the truck sped backwards at a high rate of speed," because the court did not qualify the evidence technician as an accident reconstructionist. The evidence technician testified regarding his examination, documentation, and diagramming of the evidence found at the shooting scene, including the victim's truck and the broken glass, shell casings, and skid marks in the street. Although the trial court did not qualify the evidence technician as an expert witness, his opinions on the basis of his investigation and observations of the crime scene qualified as admissible lay opinions pursuant to MRE 701, which permits a lay "witness' testimony in the form of opinions or inferences . . . limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."⁶ The evidence technician's opinions that the victim's truck sped backwards and that someone fired several shots at the truck while moving into the street constituted rational inferences from his own observations of the skid marks in the street leading to the spot where the victim's truck had backed into a pole, the broken glass in the street near the commencement of the skid mark, the bullet holes in the victim's truck, and the varying locations of the shell casings found in the street. *Richardson v Ryder Truck Rental, Inc.*, 213 Mich App 447, 455-456; 540 NW2d 696 (1995); *People v Oliver*, 170 Mich App 38, 49-51; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989).⁷

Defendant suggests that the medical examiner made an improper legal conclusion and invaded the jury's province when she characterized the gunshot wound to the victim's head as "execution-style" and intentional. The trial court properly qualified the examiner as an expert in forensic pathology in light of her board certification in forensic pathology, five years of employment as an assistant medical examiner for Wayne County, and her performance each year of between 600 and 700 autopsies, during which she testified that she determined the causes and manners of death of "individuals that die suddenly and unexpectedly, and often violently." Defendant apparently does not dispute that the victim suffered multiple gunshot wounds, including a powder-burned, contact entrance wound to the left rear of his skull.⁸ The medical

⁶ We note that defendant does not contest that the evidence technician's opinion testimony regarding the movements of the shooter assisted the jury by clarifying the significance of the abundant police testimony regarding the physical evidence discovered at the crime scene.

⁷ Even assuming that the evidence technician's challenged testimony ventured into the specialized area of accident reconstruction, a defense objection on this basis to the technician's opinions would have failed. The evidence technician properly could have expressed expert opinion testimony pursuant to MRE 702, because he had technical or specialized knowledge concerning crime scene investigation, specifically training in "[t]rafficking, diagramming, noting the different kinds of casings we find at various scenes, fragments, finger prints," and 1-1/2 years' work as an evidence technician surveying, documenting and diagramming crime scenes. *De Voe v C A Hull, Inc.*, 169 Mich App 569, 578-579; 426 NW2d 709 (1988).

⁸ Although the medical examiner did not herself perform the victim's autopsy, she reviewed the
(continued...)

examiner's opinions, on the basis of this evidence, that someone intentionally murdered the victim plainly fell within the scope of her expertise in determining the cause and manner of violent deaths, did not constitute improper speculation, and did not include an impermissible legal conclusion or invade the province of the jury.⁹ MRE 704; *People v Smith*, 425 Mich 98, 113-115; 387 NW2d 814 (1986). The medical examiner's testimony concerning the intentional, close range nature of the gunshot wound to the victim's head assisted the jury in determining whether defendant premeditated and deliberated the victim's murder. MRE 702.

Because both the evidence technician and the medical examiner offered proper opinion testimony, defense counsel need not have made meritless objections to it. *Snider, supra* at 425.

C

With respect to defendant's claim that counsel should have objected to evidence of his drug dealing activities, we already have concluded that the admission of this evidence did not affect the outcome of defendant's trial. *Carines, supra* at 763-764. Accordingly, we similarly conclude that defendant cannot demonstrate a reasonable probability that, but for any error by counsel in failing to object to this evidence, the result of the proceedings would have been different. *Pickens, supra* at 312.

D

Defendant further asserts that counsel provided ineffective assistance by failing to object to prejudicial character evidence in the form of Hill's hearsay testimony that defendant's brother had threatened to kill Hill if he testified at defendant's preliminary examination. As we indicated previously, Hill's testimony concerning defendant's brother's threat did not constitute hearsay because it was not offered to prove the truth of defendant's brother's statements. MRE 801(c); *Harris, supra* at 151.

"A witness' motivation for testifying is always of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony." *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). The statements regarding defendant's brother's threat were relevant (1) to explain Hill's initial reluctance to testify at the preliminary examination, and the change at trial in the certainty of Hill's identification of defendant, and (2) to rebut Hill's explanation that his identification of defendant at trial differed from his previous identification of defendant because the prior identification had resulted from police coercion. MRE 401, 402. The testimony had significant probative value in tending to explain the basis for Hill's varying testimony concerning the certainty of his identification of defendant, and we cannot conclude that any risk of unfair prejudice substantially outweighed this

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autopsy report of her colleague who examined the victim.

⁹ It appears unclear whether defendant specifically challenges the medical examiner's testimony that the victim was shot with a high-powered rifle and her testimony concerning the order in which the victim's injuries occurred. We find that these opinions had a factual basis in the victim's autopsy, and plainly fell within the scope of the medical examiner's expertise in determining the cause and manner of violent death.

probative value, MRE 403, especially in light of the explicit and un rebutted testimony that defendant himself did not threaten anyone.¹⁰

Because the testimony concerning defendant's brother's threat was not improper, defense counsel did not provide ineffective assistance in failing to object to the evidence. *Snider, supra* at 425.

E

Defendant next contends that counsel should have investigated and introduced evidence that another individual besides the victim occupied the cab of the victim's truck shortly before the shooting. The only suggestion that anyone other than the victim occupied the cab of the victim's truck near the time of the shooting was defendant's allegation at the hearing on his motion for a new trial "that there was an investigation by the police in which they interrogated a young man who has been identified as Weewee or Wayway, both inside and outside of the county jail. He indicates that a female was seen in the car, within the car with the victim." Apart from this bare assertion at the motion hearing, which consisted of at least double hearsay, defendant provided, and the record otherwise contains, absolutely no further identification of an alleged missing witness, or any hint regarding to what the witness could testify. Accordingly, defendant failed to satisfy his burden of demonstrating that defense counsel deprived him of a substantial defense. *Kelly, supra* at 526.

F

Defendant lastly challenges counsel's failure to move for a directed verdict of acquittal with respect to the first-degree murder charge on the basis that insufficient evidence of premeditation and deliberation existed. In light of our conclusion that ample evidence supported a rational jury's determination beyond a reasonable doubt that defendant premeditated and deliberated the victim's murder, we find no ineffective assistance in this regard. *Snider, supra* at 425.¹¹

¹⁰ In support of defendant's suggestion that the evidence of his brother's threats unfairly prejudiced him, defendant observes that, before concluding deliberations, the jury sent a note to the court expressing that some jurors were "feeling uncomfortable exiting the building." The note did not explain the specific basis for the jurors' concerns, and before the jury completed deliberations, the trial court ensured that the jury could remain inside the courthouse until the parties, witnesses, and spectators had gone. Even assuming that the jurors' concern arose from the testimony concerning defendant's *brother's* threats, defendant fails to explain how the jurors' concern arising from this highly probative evidence unfairly prejudiced *him*.

¹¹ Because defendant already had the opportunity to present in connection with his motion for a new trial evidence and argument in support of his claim of ineffective assistance of counsel, and because none of the various allegations of ineffective assistance adversely affected defendant's right to a fair trial, we decline defendant's request to remand for a further evidentiary hearing. *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

In light of our rulings on the multitude of issues presented above, we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly